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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CONSTANTINO NOVAL, Plaintiff and Respondent, v. LOUISA MORITZ, Defendant and Appellant.	B201763 (Los Angeles County Super. Ct. No. SC092340)

APPEAL from an order of the Superior Court of Los Angeles County, Jacqueline A. Connor, Judge. Affirmed.

Louisa Moritz, in pro. per.; Law Offices of Richard D. Farkas, Richard D. Farkas; Law Offices of Jon H. Freis and Jon H. Freis for Defendant and Appellant.

The Altman Law Group, Bryan C. Altman and Marla A. Brown for Plaintiff and Respondent.

Louisa Moritz appeals from an order denying her Code of Civil Procedure section 425.16 special motion to strike.[1] The trial court denied the motion as untimely and, alternatively, on the merits. Since we find no abuse of discretion in the trial court's denial of the motion on timeliness grounds, we do not reach the alternative ruling on the merits. The order is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

Prior to the present case, there was a series of lawsuits involving, in various combinations, respondent Constantino Noval; his niece and nephew, Tania and Victor Noval;[2] Victor's former girlfriend, Yana Henriks; and the Brothers Irrevocable Trust (the Trust). Appellant Moritz, an attorney, represented Tania, Victor, and the Trust at various points in the litigation. Because we resolve this appeal on procedural grounds, we recount only brief details of the prior lawsuits to provide context.

In April 2006, Constantino filed an unlawful detainer action against Victor, alleging Victor refused to vacate a condominium Constantino owned. Victor was represented by Moritz for at least part of that action. Days after Constantino's complaint was filed, the Trust filed a complaint against Constantino, alleging a variety of causes of action. The action was filed through Tania, who purported to be the trustee. The complaint was accompanied by a notice of lis pendens filed against seven of Constantino's properties, including the condominium that was the subject of the unlawful detainer action. Moritz represented Tania and the Trust when this action was filed.

In May 2006, after the Trust, through Tania, had filed suit against Constantino, it filed a petition in probate court to have Henriks removed as trustee and to have Tania reinstated as trustee. Moritz represented the Trust in this action as well.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] Because Constantino, Tania, and Victor share the same last name, we shall refer to them by their first names.

In August 2006, Constantino's demurrer to the complaint filed by Tania and the Trust was sustained, and the court ordered expungement of the lis pendens. The trial court concluded that Tania was not the trustee of the Trust, as evidenced by her admissions in the probate court matter, and therefore lacked standing to bring suit on behalf of the Trust.

Constantino filed the complaint in the present case on January 9, 2007. He alleges causes of action against Moritz for malicious prosecution, slander of title, and abuse of process. All these claims arise out of Moritz's representation of Tania and the Trust in the lis pendens proceeding. Constantino alleges Moritz knew Tania did not have standing to bring that action, and that the action was filed to cloud the title on the condominium and his other properties in order to pressure him to dismiss the unlawful detainer action against Victor.

Moritz brought a special motion to strike Constantino's complaint as a strategic lawsuit against public participation (SLAPP), subject to the provisions of section 425.16 (the anti-SLAPP statute).[3] The trial court denied the motion. Moritz timely appeals from the denial of her anti-SLAPP motion, pursuant to section 425.16, subdivision (i).

DISCUSSION

The trial court denied Moritz's anti-SLAPP motion for two reasons: the motion was not timely, and Constantino satisfied his burden to establish a probability of prevailing on his claim.

Moritz challenges the trial court's ruling on both grounds. Because we affirm the trial court's denial of Mortiz's anti-SLAPP motion as untimely, we do not reach the trial court's ruling on the merits.

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[3] Moritz labeled her motion as a motion to dismiss, rather than a special motion to strike. It is evident from her exclusive reliance on section 425.16 as the basis for dismissal that she was actually moving to strike the complaint, as provided for by the anti-SLAPP statute.

I

An anti-SLAPP motion must be filed within 60 days of service of the complaint. (§ 425.16, subd. (f).) After 60 days, the court has discretion to allow the motion to proceed "upon terms it deems proper." (*Ibid*.)

On January 9, 2007, Moritz was served by substituted service, pursuant to section 415.20, subdivision (b). A copy of the summons and complaint was mailed to Moritz the same day. Service was deemed complete 10 days later, on January 19, 2007. (§ 415.20, subd. (b).) Because Moritz had 60 days from service of the complaint to file an anti-SLAPP motion, the motion had to be filed by March 20, 2007, in order to be timely. Moritz's anti-SLAPP motion was filed May 18, 2007, almost two months after the deadline.

Moritz makes two arguments regarding the timeliness of her anti-SLAPP motion. She argues that service of Constantino's complaint was defective and therefore never started the clock running on the 60-day period to file. She also argues that the trial court exercised its discretion to allow her to file the motion after the 60-day period. Neither contention is supported by the record.

A

Moritz argues that the clock never started to run on the 60-day period to file an anti-SLAPP motion because Constantino did not comply with the statute governing substituted service. She contends Constantino failed to show he exercised reasonable diligence to complete personal service before resorting to substituted service, as required by section 415.20, subdivision (b). (See *Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1477 [substituted service without any attempt to make personal service does not satisfy section 415.20, subdivision (b)].)

Moritz does not contend that she filed a motion to quash service, nor does our review of the record reveal that she did. Section 418.10 sets out the procedure for a motion to quash service. The consequence of not moving to quash is specified in section 418.10, subdivision (e)(3): "Failure to make a motion under this section at the time of filing a demurrer or motion to strike constitutes a waiver of the issue[] of . . . inadequacy

of service of process." Moritz instead brought the alleged defect in service to the attention of the trial court as a footnote in her anti-SLAPP motion. This is not an acceptable substitute for a motion to quash. (See *Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 345 ["The statute (§ 418.10) continues to prescribe the motion to quash as the means of challenging personal jurisdiction and does not in any way imply the existence of an alternative."].) Moritz's failure to make a motion to quash before or concurrently with the anti-SLAPP motion to strike waived any objection to service.

Moritz argues, "A void service cannot be validated and a general appearance does not waive a void defect." She cites no authority for this assertion, which is not surprising since it is at odds with section 418.10, subdivision (e)(3). The cases Moritz cites for the proposition that defective service is void are distinguishable by the key fact that the defendants in those cases moved to quash service instead of making a general appearance. (See, e.g., *Honda Motor Co. v. Superior Court* (1992) 10 Cal.App.4th 1043; *Espindola v. Nunez* (1988) 199 Cal.App.3d 1389; *Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703; *Evartt v. Superior Court* (1979) 89 Cal.App.3d 795.) Another case relied on by Moritz, *Nagel v. P & M Distributors, Inc.* (1969) 273 Cal.App.2d 176, is similarly distinguishable. There, the defendant made no general appearance before moving to set aside a default judgment taken after inadequate service. (*Id*. at pp. 178-179.) Unlike these cases, Moritz made a general appearance by filing the anti-SLAPP motion to strike, without an accompanying motion to quash service. (See § 1014; see also 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 210, p. 819.)

Moritz claims, "A motion to quash cannot be combined with an anti-SLAPP motion." This is contrary to the plain language of section 418.10, subdivision (e), which says, "A defendant or cross-defendant may make a motion under this section and simultaneously answer, demur, *or move to strike* the complaint or cross-complaint." (Italics added.) Moritz points to no authority for the proposition that a special motion to strike is excluded from this provision, nor have we found such authority.

Because Moritz waived her objection to the adequacy of service, the 60-day period to file an anti-SLAPP motion ran from the date service was deemed complete, January

19, 2007. It is undisputed that the motion was not filed within this 60-day period. Accordingly, Moritz's argument that the anti-SLAPP motion was timely fails.

B

Moritz argues that, assuming the 60-day period had run before she filed the motion, the trial court chose to exercise its discretion to allow late filing of the motion. To support this argument, she points out that the trial court made an alternative ruling on the merits of the motion. Moritz's contention is at odds with the plain language of the trial court's ruling, which unambiguously states that one reason the anti-SLAPP motion was denied was that it was not timely. The trial court's tentative ruling, incorporated by reference into the final ruling, says in relevant part, "The special motion of defendant Louisa Moritz to dismiss the complaint as a SLAPP lawsuit and for attorney's fees is DENIED. First, the motion was not timely filed within 60 days of service of the complaint. (CCP § 425.16(f).) Second, the Court finds that plaintiff has established the probable validity of his claims." Similarly, at the hearing on the motion, the trial court explained to Moritz's attorney, "I am denying [the motion]. *The timeliness is an issue you can't get over* and I think probability of prevailing is sufficiently established by the plaintiff." (Italics added.) That the trial court gave an alternative reason for its ruling does not mean it was discounting the first reason.

Moritz relies entirely on the arguments that either her motion was timely or the trial court allowed late filing of the motion. She does not argue that it would be an abuse of discretion for the trial court to refuse to allow late filing of the motion. In any event, we conclude the trial court acted within its discretion in denying Moritz's motion on the basis of untimeliness.

Whether to allow a defendant to file an anti-SLAPP motion after the expiration of the 60-day period is within the trial court's discretion. (§ 425.16, subd. (f).) A reviewing court will find an abuse of that discretion only if "the trial court's decision 'exceeds the bounds of reason, all of the circumstances before it being considered.'" (*Morin v. Rosenthal* (2004) 122 Cal.App.4th 673, 681.) Moritz did not ask for leave to file the motion late, a fact that militates against allowing an anti-SLAPP motion to be filed after

the 60-day period. (See *Kunysz v. Sandler* (2007) 146 Cal.App.4th 1540, 1543; *Morin v. Rosenthal*, *supra*, 122 Cal.App.4th at p. 679.) Instead, in a footnote to the anti-SLAPP motion, she conclusorily asserted that her motion was timely because she had not been served with the complaint. She did not support this allegation with her sworn declaration or any other evidence to justify late filing of the motion.[4] And, as already discussed, the anti-SLAPP motion was not accompanied by a motion to quash service. Although Constantino raised the issue of timeliness in his opposition to the anti-SLAPP motion, Moritz did not file a reply to the opposition. In short, Moritz made virtually no effort to convince the trial court that she should be permitted to file the anti-SLAPP motion after the 60-day period. It was not beyond "the bounds of reason" for the trial court to decline to extend the filing period under these circumstances.

We affirm the trial court's denial of the motion on this basis, and do not reach the merits of the motion.[5]

II

Moritz contends the minute order from the August 20, 2007 hearing on the anti-SLAPP motion misstates the trial court's oral pronouncement giving her 20 days to

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[4] A declaration by Moritz's attorney was filed with the anti-SLAPP motion. Whether the declaration was intended to be filed in connection with this case is unclear. It does not mention Constantino, but instead references the "lawsuit of Yana Henriks" and a "RICO action." The declaration incorporates by reference a letter sent by Moritz's attorney on May 3, 2007, regarding the Henriks case. There is a May 3, 2007 letter in the record, which alleges improper service on Moritz by Constantino. It is uncertain if this is the letter to which the declaration refers, because it makes no reference to Henriks or a RICO action. Notably, the May 3 letter states, "Ms. Moritz did not reside at [the residence where substituted service was made] at any time during January 2007 or thereafter, and we have secured sworn declarations to this effect," but no such declarations appear in the record.

[5] With regard to the merits of the motion, Moritz not only argues that Constantino failed to make the requisite prima facie showing, but also argues that Constantino's alleged failure to join indispensible parties (§ 389) would prevent him from succeeding on his claim. Because we do not reach the merits of Moritz's anti-SLAPP motion, we need not consider this subsidiary issue.

respond. Constantino apparently does not disagree; he makes no mention of this issue in his brief.

The August 20, 2007 minute order states that Moritz has 20 days to *answer*. The reporter's transcript of the hearing on the anti-SLAPP motion shows that the trial court agreed to allow Moritz 20 days to *respond*. Additionally, the August 21, 2007 notice of rulings after the hearing states that the court, "at the request of [Moritz's attorney], granted Defendant twenty (20) days to respond to the Complaint." When the minute order is in conflict with the reporter's transcript, "the reporter's transcript generally prevails as the official record of proceedings." (*Arlena M. v. Superior Court* (2004) 121 Cal.App.4th 566, 570.) The August 21 notice of rulings, not the August 20 minute order, correctly states the trial court's ruling.

DISPOSITION

The order denying the motion to strike is affirmed. Constantino shall have his costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.